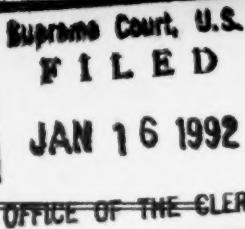


(4)

No. 91-983



In The
Supreme Court of the United States
October Term, 1991

ALLSTATE INSURANCE COMPANY,
an Illinois Corporation,

Petitioner,

v.

SAMUEL F. FORTUNATO,
Commissioner of Insurance of The State of New Jersey,
Respondent.

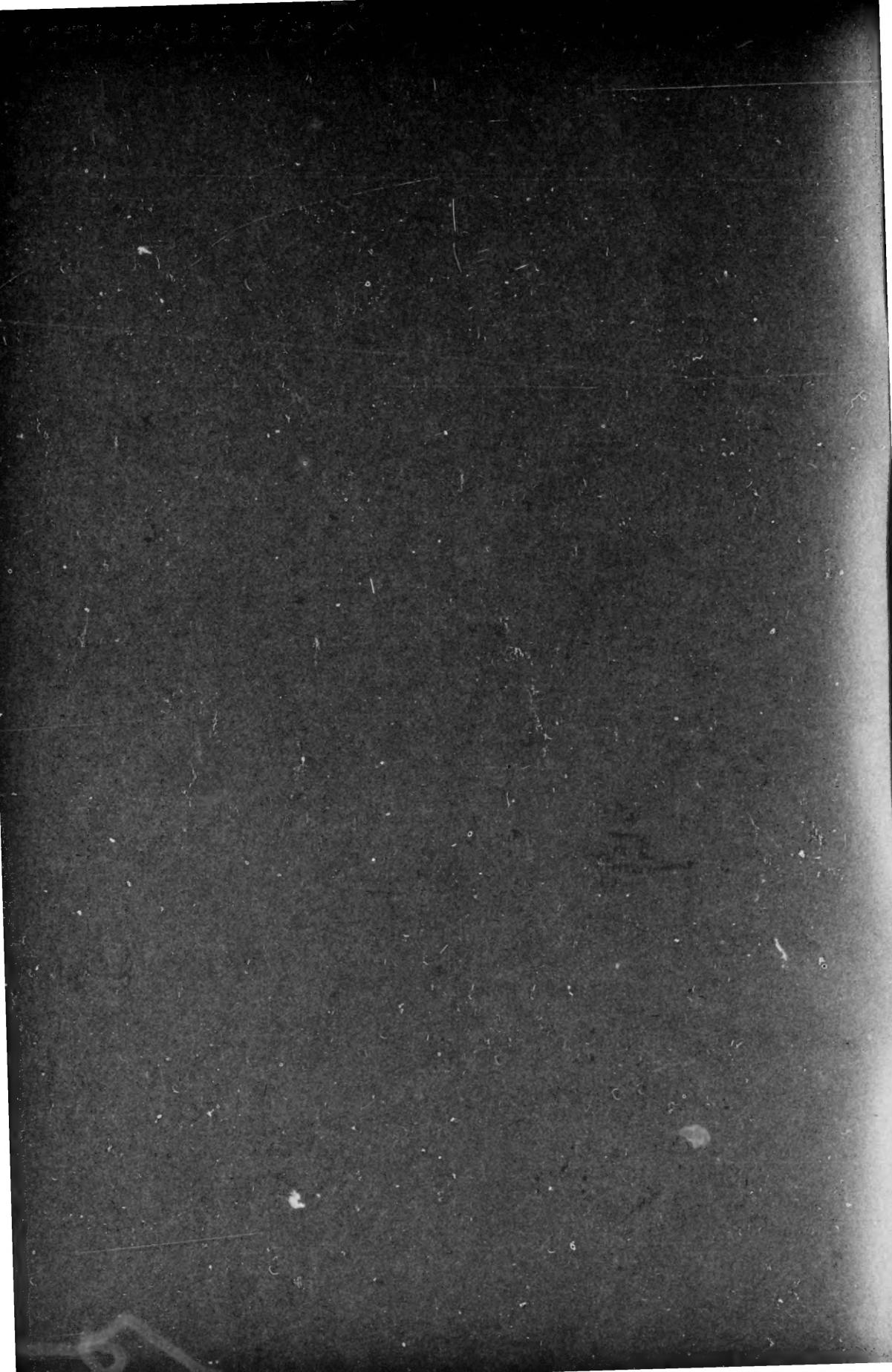
Petition For A Writ Of Certiorari To The
Appellate Division Of The Superior Court
Of The State Of New Jersey

**RESPONDENT'S BRIEF AND APPENDIX
IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI**

EDWARD J. DAUBER
Acting Attorney General of New Jersey
Attorney for Respondent
R.J. Hughes Justice Complex
CN 093
Trenton, New Jersey 08625
(609) 292-4965

JOSEPH L. YANNOTTI
Assistant Attorney General
Of Counsel

SUSAN L. REISNER
Deputy Attorney General
(Counsel of Record)
On the Brief



COUNTERSTATEMENT OF THE QUESTION PRESENTED

May a State, consistent with the Due Process Clause of the Fourteenth Amendment, order an insurance company to take on new business at rates higher than its current voluntary market rates, where a State appellate court has found, on appeal of that order, that the company has not demonstrated that the higher State mandated rates are confiscatory such that the company would be entitled to an interim rate increase in advance of implementation of the order?

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTION PRESENTED	i
COUNTERSTATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT.....	7
ARGUMENT:	
THE PETITION SHOULD BE DENIED BECAUSE ALLSTATE FAILED IN THE STATE PROCEEDINGS BELOW TO PRESENT A SUFFICIENT FACTUAL BASIS FOR INTERIM RATE RELIEF AND BECAUSE ALLSTATE HAS PRESENTED NO MERITORIOUS CONSTITUTIONAL ARGUMENTS WHICH WOULD JUSTIFY REVIEW BY THIS COURT.....	8
CONCLUSION	16
APPENDIX	
Appendix 1.....	A-1
Affidavit of Karen E. Mitchell dated May 1, 1990	
Appendix 2.....	A-8
Direct Pre-Filed Testimony of Allan I. Schwartz (pp.1-4 only) dated January 25, 1991	
Appendix 3.....	A-16
Affidavit of Martin Rosenberg dated February 22, 1991	

TABLE OF AUTHORITIES

CASES CITED	Page
<i>Banton v. Belt Line Ry. Corp.</i> , 268 U.S. 413 (1925)	12
<i>Calfarm Ins. Co. v. Deukmejian</i> , 771 P.2d 1247 (Cal. 1989)	14
<i>California Auto Association v. Maloney</i> , 341 U.S. 105 (1951)	12, 14
<i>Duquesne Light Co. v. Barasch</i> , 488 U.S. 299 (1989)	8, 15
<i>F.P.C. v. Hope Natural Gas Co.</i> , 320 U.S. 591 (1944)	15
<i>First English Evangelical Lutheran Church v. Los Angeles County</i> , 482 U.S. 304 (1987)	8, 13
<i>Hutton Park Gardens v. Town Council</i> , 68 N.J. 543, 350 A.2d 1 (1975)	14
<i>In re Matter of Assignment of Exposures to Aetna Casualty & Surety Co., Allstate Insurance Co. and Colonial Penn Insurance Co.</i> , 248 N.J. Super. 367, 591 A.2d 631 (App. Div. 1991)	8
<i>Jersey Central Power & Light Co. v. F.E.R.C.</i> , 810 F.2d 1168 (D.C. Cir. 1987)	12
<i>Lac D'Amiante du Quebec v. American Home Assur.</i> , 864 F.2d 1033 (3d Cir. 1988)	15
<i>MacDonald, Sommer & Frates v. County of Yolo</i> , 477 U.S. 340 (1986)	12
<i>Pennell v. City of San Jose</i> , 485 U.S. 1 (1988)	14
<i>Prendergast v. New York Telephone Co.</i> , 260 U.S. 43 (1923)	11
<i>Prudential Insurance Co. v. Benjamin</i> , 328 U.S. 408 (1946)	15

TABLE OF AUTHORITIES - Continued

	Page
<i>Public Util. Comm'n of Texas v. Pedernales Elec. Coop</i> , 678 S.W.2d 214 (Tex. Ct. App. 1984).....	13
<i>Smith v. Illinois Bell Co.</i> , 270 U.S. 587 (1926).....	12
<i>State Farm v. State of New Jersey</i> , 124 N.J. 32, 590 A.2d 191 (1991).....	8
<i>Williamson Planning Commission v. Hamilton Bank</i> , 473 U.S. 172 (1985).....	13

STATUTES CITED

<i>N.J.S.A. 17:29A-14c(1)</i>	13
<i>N.J.S.A. 17:29A-44(a)</i>	11
<i>N.J.S.A. 17:29A-44(f)</i>	11
<i>N.J.S.A. 17:29D-1</i>	2
<i>N.J.S.A. 17:30E-1 et seq.</i>	2
<i>N.J.S.A. 17:30E-7e</i>	2
<i>N.J.S.A. 17:30E-8</i>	2
<i>N.J.S.A. 17:30E-14</i>	1, 3, 4
<i>N.J.S.A. 17:33B-2g</i>	8
<i>N.J.S.A. 17:33B-11</i>	1, 4
<i>N.J.S.A. 17:33B-12</i>	1, 4, 5
<i>N.J.S.A. 39:6A-1 et seq.</i>	2
<i>N.J.S.A. 52:14F-1 et seq.</i>	13
<i>15 U.S.C.A. §§1011-15 (1982)</i>	15

TABLE OF AUTHORITIES – Continued**Page****REGULATION CITED**

<i>N.J.A.C.</i> 11:3-34.1 <i>et seq.</i>	6
--	---

LAWs CITED

<i>L. 1988, c. 199, §25</i>	3
<i>L. 1990, c. 8</i>	3

RULES CITED

<i>Sup.Ct.R.</i> 10.1(b)	15
<i>Sup.Ct.R.</i> 10.1(c)	8, 15



COUNTERSTATEMENT OF THE CASE

Pursuant to a legislative directive to depopulate, or downsize, the New Jersey Automobile Full Insurance Underwriting Association ("JUA") and the Market Transition Facility ("MTF") in preparation for a new automobile insurance assigned risk plan, the New Jersey Commissioner of Insurance issued orders on January 24, 1991 assigning exposures (automobiles) to insurers, including petitioner Allstate Insurance Company ("Allstate"), that had not complied with their statutory obligations to insure a certain number of risks in the voluntary market (Pet. App. 1).* See N.J.S.A. 17:30E-14; 17:33B-11. Under the statutory scheme, insurers are permitted to charge these assigned insureds the higher rates applicable to persons presently insured by the MTF. The legislatively-mandated depopulation assignments are an essential part of the transition from the JUA, which had insured up to 50% of New Jersey's drivers, to the new assigned risk plan, which should provide insurance to only 10% of New Jersey's drivers. See N.J.S.A. 17:33B-11; 17:33B-12.

Petitioner Allstate, which did not write its statutorily required share of former JUA insureds and so was assigned exposures, challenged the depopulation program as unconstitutional because, Allstate averred, under no conceivable set of circumstances could it realize a just and reasonable return. Allstate's assertions are based on predictions of higher risks and inadequate rates; however, the evidence presented below did not substantiate

* "Pet. App." refers to Allstate's appendix filed with the petition for a writ of certiorari.

these assumptions. The New Jersey Superior Court, Appellate Division rejected these contentions and affirmed the Commissioner's orders (Pet. App. 2). The Supreme Court of New Jersey denied Allstate's petition for certification (Pet. App. 3).

All New Jersey drivers are required to obtain automobile insurance as a condition of owning and operating an automobile. N.J.S.A. 39:6A-1 *et seq.* Between 1970 and 1983, drivers who could not obtain insurance in the voluntary market were apportioned among all insurers doing business in New Jersey, who were obligated to extend coverage pursuant to an assigned risk plan. See N.J.S.A. 17:29D-1. This system was changed in 1983, when the Legislature created the New Jersey Automobile Full Insurance Underwriting Association ("JUA") to provide such drivers with insurance coverage at statutorily-set rates. See N.J.S.A. 17:30E-1 *et seq.*

The JUA operated through servicing carriers which undertook the administrative responsibility of providing coverage and adjusting claims. N.J.S.A. 17:30E-7e. However, all claims and liabilities arising from JUA policies were paid by the JUA and not by the servicing carriers. *Ibid.* The JUA derived income from a number of sources other than premium payments, including Department of Motor Vehicle surcharges for certain violations, and charges imposed, on a per vehicle basis, on all automobile insurance policies. N.J.S.A. 17:30E-8. Essentially, because driving an automobile is a necessary part of life in New Jersey, automobile insurance policies for drivers who could not otherwise obtain insurance (and might then drive uninsured) were subsidized by all drivers.

However, while the JUA was in existence more and more persons were being refused coverage in the voluntary market, sometimes regardless of their driving records, and by 1988 the JUA was providing insurance to over 50% of New Jersey's drivers.* The Legislature, recognizing that the burgeoning JUA was no longer serving its purpose of providing coverage to only a limited number of drivers, passed amendments to the automobile insurance statutes to downsize, or depopulate, the JUA over a period of time. *L.* 1988, c. 199, §25 (amending N.J.S.A. 17:30E-14). The Legislature thus established a program to require insurers to write an increasing percentage of JUA insureds in the voluntary market pursuant to yearly quotas for the industry and apportioned shares of that quota for each insurer authorized to conduct automobile insurance business in New Jersey. *Ibid.* The amendments provided that in the event the aggregate industry depopulation quota for exposures (automobiles) to be insured in the voluntary market is not met, the Commissioner of Insurance would assign exposures from the JUA to insurers that did not meet their apportionment shares. *Ibid.*

New Jersey's automobile insurance system was again comprehensively revised on March 12, 1990 by the Fair Automobile Insurance Reform Act, *L.* 1990, c. 8 ("FAIR Act"). The FAIR Act eliminated the JUA, directing it not

* Under the JUA system, insurers had an incentive to write only the cleanest risks voluntarily; any applicant without a proven long-term clean record could be shifted to the JUA since then the insurer would not be liable for any claims arising under the policy.

to issue any policies after October 1, 1990, and created the Market Transition Facility ("MTF") to provide automobile insurance to JUA insureds and persons unable to obtain insurance in the voluntary market between October 1, 1990 and October 1, 1992.* After October 1, 1992, automobile insurance policies for persons unable to obtain insurance in the voluntary market will be written by insurers pursuant to an assigned risk plan. FAIR Act, §24 (N.J.S.A. 17:33B-12). The FAIR Act also accelerated the schedule for the depopulation of the JUA and MTF in preparation for the assigned risk plan. FAIR Act, §§20, 88 (N.J.S.A. 17:30E-14; 17:33B-11). Pursuant to the accelerated depopulation schedule, only 32% of exposures would be covered by the JUA or MTF by October 1, 1990; 29% by April 1, 1991; 20% by October 1, 1991 and 10% by April 1, 1992. *Ibid.* If the industry quota is not met, the statutes direct the Commissioner to assign exposures to insurers that had not met their apportionment shares. *Ibid.*

The October 1, 1990 industry quota was not met. In accordance with N.J.S.A. 17:30E-14 the Commissioner issued orders on January 24, 1991 assigning exposures to the 44 insurers that did not meet their apportionment shares, including petitioner Allstate (Pet. App. 1). Twenty-four insurers, including several large companies, had met their shares and were not assigned exposures

* The MTF, an unincorporated association of insurers authorized to conduct automobile business in New Jersey, is operated by the Commissioner of Insurance in consultation with an Advisory Board, comprised of various industry representatives. FAIR Act, §88 (N.J.S.A. 17:33B-11).

(CPa77).* Attached to the orders was the Mandatory Depopulation Assignment Plan, which set forth the manner in which assignments were made. The Plan provided that JUA/MTF insureds who reside in the areas in the State that are most underrepresented in the voluntary market would be assigned first, until the percentage of JUA/MTF insureds in those areas is brought up to the level of the industry quota (*i.e.*, 32% for October 1, 1990 quota) (CPa8). The Plan further provided that the insurers offer assignees one-year policies (CPa28).

Finally, and most significantly, section 89 of the FAIR Act (N.J.S.A. 17:33B-12) permits these insurers that did not meet their apportionment shares to charge assigned insureds MTF rates, which are generally higher than the insurer's own voluntary market non-standard or standard rate.

Allstate, which did not meet its apportionment share, appealed the Commissioner's January 24, 1991 orders assigning it exposures (CPa72). The appeal was accelerated by the Appellate Division, and the depopulation program was stayed. *Ibid.* Prior to oral argument before

* Ra refers to respondent's Appellate Division appendix; Rra refers to respondent's Appellate Division reply appendix; ALb refers to the brief filed by petitioner Allstate in the Supreme Court of New Jersey. Additional citations are to briefs and appendices filed by co-petitioners in the Supreme Court of New Jersey. These materials are part of the record below, although the co-petitioners did not file petitions with this Court. AEB refers to petitioner Aetna's brief; AEa refers to petitioner Aetna's appendix; CPb refers to petitioner Colonial Penn's brief and CPa refers to petitioner Colonial Penn's appendix.

the Appellate Division, the Commissioner amended the Depopulation Plan so that persons with nine or more points (*i.e.*, moving vehicle violations and other infractions) would remain in the MTF; only those persons with fewer than eight points would be assigned to and covered by insurers. The amendments, transmitted to insurers after oral argument, provided that insurers screen assigned insureds and return to the MTF all assignees that are "ineligible" as defined in N.J.A.C. 11:3-34.1 *et seq.* See CPa32.

Before the Appellate Division rendered its decision, the Commissioner approved an 18.6% overall average rate increase for MTF insureds (Ra19). Thereafter, following a separate appeal by Allstate concerning the adequacy of this rate increase, the Commissioner's staff filed for an additional 15% rate increase, which the Commissioner implemented. (Pet. at 17).

On May 20, 1991 the Appellate Division affirmed the Commissioner's January 24, 1991 depopulation orders (Pet. App. 2). The Appellate Division rejected Allstate's takings arguments, holding that Allstate had not proven that MTF rates would be facially inadequate to cover the costs of insuring assigned drivers. In fact, the record before the Court contained submissions from both the Insurance Department Staff and the Public Advocate Division of Rate Counsel which indicated that Allstate's existing rates were too high and should be reduced. (R. App. 1, 2, and 3). The Appellate Division further held that the Commissioner's decisions to assign insureds from underrepresented territories first, and to require one-year policies be issued, were reasonable. Finally, the Appellate Division invalidated the part of the program

that required insurers to do business with the assigned insureds' producers.* Allstate filed a petition for certification to the Supreme Court of New Jersey, which was denied on September 18, 1991 (Pet. App. 3). Allstate's petition to this Court for a writ of certiorari followed.

SUMMARY OF ARGUMENT

Allstate's petition requests this Court to intervene in an essentially fact-based dispute over its entitlement to interim rate relief. The petition should be denied because the proceedings below are being properly handled by the Insurance Commissioner and the State's courts, in accordance with well established constitutional principles enunciated by this Court. Allstate failed, on the evidence submitted, to establish to the satisfaction of the Commissioner or the Appellate Division that the MTF rates, which are higher than Allstate's own rates, will be confiscatory. Moreover, Allstate's claim of an absolute right to protection against any possible financial loss due to rate lag is without merit. For these reasons, Allstate's facial challenge to the depopulation order at issue here was properly rejected by the State court below. Since Allstate raises no valid or significant constitutional objections to the ruling below, the petition for a writ of certiorari should be denied.

* On December 31, 1991, the Commissioner issued a revised order to Allstate which changed this aspect of the program.

ARGUMENT

THE PETITION SHOULD BE DENIED BECAUSE ALLSTATE FAILED IN THE STATE PROCEEDINGS BELOW TO PRESENT A SUFFICIENT FACTUAL BASIS FOR INTERIM RATE RELIEF AND BECAUSE ALLSTATE HAS PRESENTED NO MERITORIOUS CONSTITUTIONAL ARGUMENTS WHICH WOULD JUSTIFY REVIEW BY THIS COURT.

Upon review of its petition for a writ of certiorari, it is clear that Allstate has presented no questions which require review by this Court. It is clearly established by this Court, and well recognized in New Jersey law and New Jersey court decisions, that a rate regulated entity such as a public utility or insurance company has a constitutional right to earn a reasonable rate of return on its investments. *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989); N.J.S.A. 17:33B-2g; *State Farm v. State of New Jersey*, 124 N.J. 32, 590 A.2d 191 (1991). This principle was recognized by the Appellate Division below. *In re Matter of Assignment of Exposures to Aetna Casualty & Surety Co., Allstate Insurance Co. and Colonial Penn Insurance Co.*, 248 N.J. Super. 367, 591 A.2d 631 (App. Div. 1991) (Pet. App. 2). This is not a case in which a state's appellate courts have adopted an erroneous rule of law which requires correction by this Court. Sup.Ct.R. 10.1(c). Compare *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). Rather, this case represents a cogent, well-reasoned application by the New Jersey Superior Court, Appellate Division, of settled principles of law in a case in which there are hotly contested factual issues and in which the insurer here simply failed to establish as a matter of fact that it was entitled to interim rate relief.

Having failed to convince the State court below, on the factual record, of its right to interim relief, petitioner Allstate now nevertheless claims that it was denied an appropriate judicial process for judging its request for rate relief (Petition at 28) or, in the alternative, that the State may not impose the depopulation plan at issue here without first holding a plenary hearing on the rate impact of the plan on the subject insurance companies. Taken to its logical extension, Allstate's position is that it has an absolute constitutional right to protection against regulatory lag, and that a state therefore may not impose any regulatory requirements on insurance companies (or by implication, utilities either) without first holding a proceeding to determine the rate impact on the regulated entities and adjusting their rates prospectively to ensure their absolute protection against any financial loss resulting from the proposed new regulatory requirement. Allstate's contentions are totally lacking in merit.

In fact, as the Appellate Division's decision below clearly indicates, Allstate has already had an opportunity for judicial review of its claim for interim rate relief. Neither the Insurance Commissioner nor the Court, however, have found Allstate's factual claims persuasive enough to justify such relief.* Therefore, even by the

* It must be remembered that granting interim rate increases to insurance companies in a state such as New Jersey where all drivers are required to have insurance, places an immediate and substantial financial burden on that company's customers without giving them the benefit of a full adjudication of the merits of the company's claim for rate relief. Consequently, any claim for interim rate relief based on a company's asserted

(Continued on following page)

standards Allstate suggests in its own petition, i.e., those applicable to motions for preliminary injunctive relief, (Petition at 28 n.25), it would not be constitutionally entitled to relief here.

Indeed, as the Appellate Division noted below,

The record before us is full of significant and irreconcilable factual differences. The insurers offer complex financial analyses and the assurance of their actuaries and executives that they are losing millions of dollars on their current New Jersey business. They say the near future promises even greater losses with or without their assigned JUA/MTF business, that the Commissioner is dragging his feet in considering their rate filings, and that forcing more business on them at insufficient rates is confiscatory. The Commissioner offers equally complex analyses and the assurance of his actuaries that the insurers are really doing just fine, and that their complaints are baseless. [Pet. App. 2 at 62].

The record supports this view. Ranged against Allstate's dire predictions of financial loss are expert testimony from both the Commissioner's staff and the State Public

(Continued from previous page)

right to an absolute guarantee against any possible financial loss due to regulatory lag, must be weighed against the financial burden that its request will place upon thousands of ordinary citizens who may already be struggling to pay existing rates. The fact that rates may be interim, and hence subject to eventual refund, does not necessarily mitigate the temporary financial hardship which a rate increase, which later proves to be unjustified, immediately places upon the company's insureds.

Advocate Division of Rate Counsel (R. App. 1, 2 and 3) showing that Allstate in fact is overearning and that its rates should be decreased rather than increased.*

Moreover, Allstate has chosen in its brief to this Court to bury in footnotes certain significant information which undercuts its position. Not only will Allstate be allowed to charge the new exposures the MTF rate, which is higher than Allstate's regular voluntary market rate, but that MTF rate has already been raised twice, once through an 18.6% increase in rates of poorer drivers and a second 15% increase on rates paid by better drivers. Moreover, New Jersey law allows all insurance companies the benefit of annual "flex rate" increases which may be instituted without a rate hearing. N.J.S.A. 17:29A-44(a), -44(f). These increases are based on a percentage of specified components of the Consumer Price Index plus 3%, thus cushioning the companies against losses due to regulatory lag. Allstate sheepishly admits (Petition at 29 n.26) that it has taken three of these increases since March 1989. Hence, unlike *Prendergast v. New York Telephone Co.*, 260 U.S. 43 (1923), in which there was clear proof of confiscatory rates, resulting from an order to *reduce* rates, here there is simply an order by the Insurance Commissioner to cover certain customers, as

* The Appellate Division specifically found that "the insurers do not make a case of sufficient strength to justify our entering an order freezing in place a currently disastrous insurance industry situation until the insurers' hyperbole can be tested against the Commissioner's incredulity. The resulting turmoil in the State's auto insurance industry would be intolerable." [Pet. App. 2 at 63].

clearly authorized by *California Auto Association v. Maloney*, 341 U.S. 105 (1951), and there is no proof of confiscatory rates. Moreover, the company here is permitted to charge the new customers a rate higher than its voluntary rate. Compare *Jersey Central Power & Light Co. v. F.E.R.C.*, 810 F.2d 1168 (D.C. Cir. 1987) (company ordered to reduce rates without hearing); *Smith v. Illinois Bell Co.*, 270 U.S. 587 (1926) (delay of three years in ruling on rate petition where no dispute that existing rates were confiscatory); *Banton v. Belt Line Ry. Corp.*, 268 U.S. 413 (1925) (company denied rate increase for 8 years; no dispute that rates were confiscatory). Clearly there was no due process or other constitutional violation in the Commissioner's denial of interim relief in this case.

Finally, it should be noted that in separate pending proceedings to increase Allstate's voluntary market rates, the Commissioner has denied Allstate's requests for interim relief, in part on the ground that the factual submissions showed a hotly contested issue as to whether Allstate actually needed a rate increase. (Pet. App. 16). That ruling, which encompasses the issue of the Commissioner's power to issue interim relief under state law, is currently pending before the Superior Court, Appellate Division. To the extent that Allstate claims in fact that it has been deprived of a just rate of return, this claim is not ripe, because Allstate has not yet even extended coverage to the insureds at issue here and because its current rate increase petitions are still pending. See *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986);

Williamson Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985).*

Allstate's second point concerning an absolute right to protection against regulatory lag is equally lacking in merit. This Court has never held that there is a right to protection against all monetary losses due to delay in the regulatory process. Indeed in the *First English Evangelical Lutheran Church* case, on which Allstate relies (Petition at 20), wherein this Court ruled that state regulation which denies the use of property for a "considerable period of years" could constitute a taking, this Court carefully distinguished "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances and the like." 482 U.S. at 321. Plainly, a certain degree of delay in the rate adjustment process is simply a "necessary incident of rate regulation" which is an element of the risk associated with investment in a rate-regulated business. *See Public Util. Comm'n of Texas v. Pedernales Elec. Coop.*, 678 S.W.2d 214, 222 (Tex. Ct. App. 1984).

* Allstate's rate hearings are being held before independent administrative law judges, N.J.S.A. 52:14F-1 *et seq.* Allstate's hearing on a petition to raise its voluntary rates has concluded and the parties are awaiting the ALJ's initial decision after post-hearing submissions. The insurance statute, N.J.S.A. 17:29A-14c(1), establishes a strict time frame for the issuance of the Commissioner's final order following receipt of the initial decision. A second hearing, on a petition to raise the rates to pass through certain surtaxes and assessments, is still pending before an ALJ. Allstate makes reference to this proceeding as "mired in discovery" (Pet. at 13); such delay is due to Allstate's refusal to cooperate with discovery requests from the Insurance Department's staff and Rate Counsel.

Indeed, it is well established that a regulation which controls rates, and by logical extension, a scheme which simply requires coverage of insureds at existing or higher rates, will be invalidated "on its face only if its terms preclude avoidance of confiscatory results." *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247, 1252 (Cal. 1989), citing *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 350 A.2d 1, 16 (1975). As this Court clearly held in *Maloney, supra*, a state may require an insurance company to cover customers that it would rather not insure:

The problem is a local one on which views will vary. We cannot say California went beyond permissible limits when it made the liability insurance business accept insurable risks which circumstances barred from insurance and hence from the highways. Appellant's business may of course be less prosperous as a result of the regulation. That diminution in value, however, has never mounted to the dignity of a taking in the constitutional sense. [*California Auto. Assoc. v. Maloney, supra*, 341 U.S. at 110-111].

Here, where Allstate has the option of charging these customers a higher rate even than its voluntary market rates, and where it has failed on the factual record to establish to the satisfaction of state appellate courts its need for interim rate relief, there is no constitutional violation and no need for review by this Court.

Finally, there is no significance to Allstate's claim (Petition at 20-21), that certiorari should be granted to resolve differences among state courts in dealing with various types of rate requests. It is well established that insurance regulation is uniquely a state concern. In fact,

Congress passed the McCarran-Ferguson Act, 15 U.S.C.A. §§1011-15 (1982), to ensure that states would be able to tailor their own individualized methods of regulating insurance companies in their states. See *Lac D'Amiante du Quebec v. American Home Assur.*, 864 F.2d 1033, 1039 (3d Cir. 1988), citing *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946) ("Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance"). Given Congress' intention that the states act as "laboratories" in this regard, and this Court's well established rule that there is no one constitutionally required method of rate regulation, *Duquesne Light Co. v. Barasch, supra*; *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), it is not surprising that different states have reached different conclusions as to their requirements for rate regulation in their own jurisdictions. This result is not one of constitutional magnitude, was plainly within the contemplation of Congress, and does not require intervention or review by this Court. *Sup.Ct.R.* 10.1(b), (c).

In summary, it is clear that Allstate's petition requests this Court to intervene in an essentially fact-based rate dispute which is being properly handled by the Commissioner and the State's courts, in accordance with well established constitutional principles enunciated by this Court in its decisions. The petition should therefore be denied.

CONCLUSION

The petition in this case presents no issues of constitutional magnitude. Allstate has received judicial review of its claim to interim rate relief and has been denied such relief based upon the hotly contested factual record in this case. Moreover, Allstate's claim of an absolute right to protection against any financial loss due to regulatory lag is completely lacking in merit. Its facial challenge to the depopulation order must fail given the lack of conclusive factual proof that any such loss will occur. For all of these reasons, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

ROBERT J. DEL TUFO
Attorney General of New Jersey
Attorney for Respondent
Samuel F. Fortunato,
*Commissioner of Insurance of
the State of New Jersey*

By: Susan L. Reisner
Deputy Attorney General
On the Brief
(Counsel of Record)

JOSEPH L. YANNOTTI
Assistant Attorney General
Of Counsel

DATED: January 16, 1992

APPENDIX 1

DOUGLAS S. EAKELEY
Acting Attorney General of New Jersey
Attorney for State Defendants
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

By: Joseph L. Yannotti
Deputy Attorney General
(609) 292-1539
JY 4102

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

ALLSTATE INSURANCE)	
COMPANY,	)	Honorable
(an Illinois Corporation),	)	John W.
Plaintiff,	)	Bissell
v.	)	Civil Action
JAMES J. FLORIO, in his	)	No. 90-1366
official capacity as Governor	)	AFFIDAVIT
of the State of New Jersey	)	OF
and in his individual	)	KAREN E.
capacity; JASPER J. JACKSON,	)	MITCHELL
in his official capacity)	
as Acting Commissioner of)	
Insurance of the State of)	
New Jersey; and ROBERT J.)	
DEL TUFO, in his official)	
capacity as Attorney General)	
of the State of New Jersey,)	
Defendants.)	

KAREN E. MITCHELL, of full age, being duly sworn, according to law, upon her oath, says:

1. I am the Chief Examiner of the Department of Insurance of the State of New Jersey, Division of Financial Examinations. As such, I am responsible for examining the financial health of insurance companies operating in New Jersey. Part of that examination involves review of the Annual Statements filed with the Department by each company according to law. A review of a company's Annual Statement can reveal whether or not that company experienced an operating profit or loss during the year reflected in the Annual Statement.

2. I make and submit this Affidavit in response to Allstate's allegations of unprofitability in its Complaint, to the extent that the Court may deem it necessary to consider Allstate's factual contentions in disposing of the motions pending before it.

3. I have reviewed the 1988 and 1989 Annual Statements of Allstate Insurance Company. Contrary to what Allstate is alleging in this Complaint, it appears the company showed a profit on New Jersey private passenger automobile business in both 1988 and 1989. I must caution this Court that, with the exception of the "State Business Page" of the Annual Statement (page 14), no financial data filed in Annual Statements deals specifically and solely with the New Jersey part of a company's business unless the company writes business only in New Jersey. All Annual Statements reveal, on the State Business Page, the amounts of gross premiums written and earned, and total losses paid and incurred, in New Jersey. All other information contained in Annual Statements, including expenses and investment income, are reported as world-wide figures. Therefore, my analysis of

how well Allstate has performed on its private passenger automobile business in New Jersey is based in part on the actual figures on the State Business Page, and in part on estimated figures provided in the A.M. Best Aggregates and Averages Property and Casualty Manual. In making my calculation, I have taken the actual reported direct premiums earned from the State Business Page from Allstate's Annual Statements, and subtracted therefrom the actual losses paid and incurred on New Jersey business. I have further subtracted estimated loss adjustment and other expenses derived from applying industry-wide ratios as reported in A.M. Best to Allstate. Finally, I added estimated investment income similarly computed by applying A.M. Best ratios. My analysis is set forth in Exhibit A. It reveals that Allstate, in 1989, reported \$233,264,423 in earned premiums on New Jersey Private passenger automobile business, and \$185,145,357 in actual incurred losses.

4. The latter figure is an inflated calculation of incurred losses. It is inflated because it fails to deduct from those losses the amount of the incurred reimbursement to Allstate from the Unsatisfied Claim and Judgment Fund. Allstate, unlike most other companies, reports its actual incurred losses as including all monies advanced to claimants on behalf of the Unsatisfied Claim and Judgment Fund. ("UCJF" or "the Fund").

5. The Fund is organized by statute and its major function is to bear the cost of any individual's medical expenses resulting from any one accident to the extent those expenses exceed \$75,000. In other words, that individual's own insurance carrier is responsible for the first \$75,000 in medical expenses, and then the Fund is responsible. In practice the carriers continue to pay the insured's

medical expenses even when they exceed \$75,000, and then the carriers are reimbursed by the Fund for the amounts paid in excess of \$75,000. Thus at any given time, the books of a carrier in the auto insurance business will reflect an amount due from the Fund.

6. As a result of that reimbursement procedure, Allstate has set up its reported paid and incurred losses as *including* all medical expenses paid to any individual insured in excess of \$75,000 *without excluding* the amount reimbursed by the Fund. The Department is aware of this practice, since it is made evident by Allstate's inclusion, on Schedule F of its Annual Statement, of over \$111 million in money due to it from the Fund, as if the Fund was a reinsurer. Nothing on Schedule F is factored into reported paid and incurred losses on the State Business Page. Therefore, we know that the amount of incurred reimbursement from the Fund is *not* factored into Allstate's reported losses. This is inappropriate as a measure of determining whether a company made a profit. Clearly the amount of incurred reimbursement must be factored in order to arrive at a true picture of a company's profits.

7. After factoring that UCJF reimbursement in, Allstate's losses are reduced by over \$24 million in 1989, and also by over \$24 million in 1988. After subtracting estimated expenses and adding estimated investment income, Allstate shows an apparent 1989 profit on its private passenger automobile business of \$8,823,392, and an apparent 1988 profit of \$8,795,496. This results from only examining that *one* factor, treatment of Fund reimbursement. There are a multitude of other factors that, once verified, can alter the company's profit figure for each year. For example, Allstate reports a premium "ceded" to the Fund of over \$26 million on Schedule F.

No other company reports any such figure, and, I do not know the origin of that figure. The Fund obtains no "premiums", only "assessments," and the assessments are in no way as much as \$26 million. Until that figure is explained, my conclusion is a qualified one. The \$26 million reported "ceded" premiums *may* have an impact on Allstate's profit or loss in 1989 and in 1988. In addition, each profit figure may be higher or lower depending on how close the estimated expense and investment income figures are to the actual numbers. The Court should also be aware that these calculations do not account for the effect of reinsurance, which could also raise or lower the overall profit figure, depending on how successful Allstate was in reinsuring its losses. The financial data needed in order to make that analysis is not available, as mentioned above.

8. Finally, I note that my findings do not agree with the figures noted for Allstate in the Department's November 1989 "Insurer Profitability Report." The figures in that report were taken from insurance company records without independent verification by the Department. We now know that the figures contained therein relating to individual carriers' New Jersey performance may be totally inaccurate, as they are with respect to Allstate. Accordingly, the Department is working on amending that report to reflect independent analysis.

/s/ Karen E. Mitchell
Karen E. Mitchell

Sworn to and Subscribed
before me this 16th day
of May, 1990.

/s/ Stephen P. Tasy
Attorney-At-Law
State of New Jersey

EXHIBIT A

1989

	<u>No Fault & Liability</u>	<u>Physical Damage</u>	<u>Total</u>
Premiums			
Earned	\$147,660,175	\$85,604,248	\$233,264,423
*Losses			
Incurred	113,289,653	47,213,633	160,503,286
LAE Incurred	19,491,143	6,762,736	26,253,879
Other			
Underwriting Expenses	<u>35,528,925</u>	<u>18,532,481</u>	<u>54,061,406</u>
Total			
Expenses	\$168,309,721	72,508,849	240,818,570
Underwriting Gain (Loss)	(20,649,546)	13,095,399	(7,554,147)
Investment			
Income	14,323,037	2,054,502	16,377,539
Net Gain (Loss)	(6,326,509)	15,149,901	8,823,392

* Reported losses incurred	137,931,724
UCJ reimbursement	13,746,161
Ending Balance UCJ	111,926,921
Beginning Balance	101,031,011
Total	113,289,653

(Incurred basis)

	<u>No Fault & Liability</u>	<u>Physical Damage</u>	<u>Total</u>
Premiums Earned	\$137,278,946	\$97,942,581	\$235,221,527
*Losses Incurred	112,964,490	49,951,416	162,915,906
LAE Incurred	18,120,821	7,737,464	25,858,285
Other Underwriting Expenses	<u>30,743,940</u>	<u>22,574,579</u>	<u>53,318,520</u>
Total Expenses	161,829,251	80,263,459	242,092,710
Underwriting Gain (Loss)	(24,550,305)	17,679,122	(6,871,183)
Investment Income	13,316,058	2,350,622	15,666,680
Net Gain (Loss)	(11,234,247)	20,029,744	8,795,496

* Reported losses incurred	\$137,389,274
UCJ reimbursement	11,527,832
Pending Balance UCJ	101,031,011
Beginning Balance	<u>88,134,059</u>
	<u>\$112,964,490</u>

APPENDIX 2
STATE OF NEW JERSEY
DEPARTMENT OF INSURANCE

In The Matter of the Rate Application by Allstate
Insurance Company Dated October 15, 1990 Requesting
a +27.7% Increase in Private Passenger Automobile
Insurance Rates

OAL Docket No: INS 9536-90

NJDOI File No: 90-1320

Exhibit PT-1

Direct Pre-Filed Testimony and Exhibits of
Allan I. Schwartz

On Behalf of the
New Jersey Department of the Public Advocate
Division of Rate Counsel

January 25, 1991

In The Matter of the Rate Application by Allstate
Insurance Company Dated October 15, 1990 Requesting
a +27.7% Increase in Private Passenger Automobile
Insurance Rates

OAL Docket No: INS 9536-90: NJDOI File No: 90-1320

Direct Pre-Filed Testimony and Exhibits of Allan I.
Schwartz On Behalf of the New Jersey Department of
the Public Advocate

Table of Contents

<u>Item</u>	<u>Description</u>	<u>Pages</u>
I	Qualifications	1 - 2
II	Summary	2 - 4
III	Overall Ratemaking Methodology	4 - 9
IV	Loss Development	9 - 12
V	Trend Period/Effective Date	12 - 15

VI	Annual Trend Factors	15 - 19
VII	Impact of the FAIR Act	20 - 21
VIII	Depopulation of JUA	21 - 23
IX	Underwriting Profit and Contingencies	23 - 27
X	Additional Contingency Loading	27 - 29
XI	Market Transition Facility	29 - 30
XII	Private Passenger Automobile Profits	30 - 31
XIII	CAS Ratemaking Principles	31 - 33
XIV	Conclusion	33 - 34
	Background of Allan I Schwartz	Appendix A
	Glossary of Insurance Terms	Appendix B

In The Matter of the Rate Application by Allstate
 Insurance Company Dated October 15, 1990 Requesting
 a +27.7% Increase in Private Passenger Automobile
 Insurance Rates

OAL Docket No: INS 9536-90: NJDOI File No: 90-1320

Direct Pre-Filed Testimony and Exhibits of Allan I.
 Schwartz On Behalf of the New Jersey Department of
 the Public Advocate

List of Exhibits

<u>Exhibit Number</u>	<u>Description</u>
1	Summary of Rate Level Changes
2	Derivation of Rate Level Changes
3	Comparison of Overall Rate Level Indica- tions
4	Loss Development
5	Total Loss and Premium Trend Factors
6	Annual Loss Trend Factors
7	Fast Track Trend Data

- 8 FAIR Act Savings
- 9 Permissible Loss & Loss Expense Ratio
- 10 Underwriting Profit and Contingencies
- 11 Countrywide Residual Market Share
- 12 Data Bank Information on JUA Insureds
- 13 Allstate's N.J. Private Passenger Auto Profits

STATE OF NEW JERSEY
DEPARTMENT OF INSURANCE

In the Matter of the Rate) OAL Docket No:
Application by Allstate Insurance) INS 9536-90
Company Dated October 15, 1990) NJDOI File No:
Requesting a +27.7% Increase in) 90-1320
Private Passenger Automobile)
Insurance Rates)

Direct Pre-Filed Testimony of Allan I. Schwartz On
Behalf of the New Jersey Public Advocate

I - QUALIFICATIONS

1. Q. Please state your name and address?
 - A. My name is Allan I. Schwartz. My address is 4400 Route 9 South, Freehold, New Jersey.
2. Q. By whom are you employed and in what capacity?
 - A. I am President of AIS Risk Consultants, an actuarial consulting firm which I started in November 1984. In that capacity I have performed

consulting work for a variety of clients covering a wide spectrum of actuarial projects.

3. Q. What was your previous employment history?
 - A. From May 1988 to January 1990 I was Assistant Commissioner with the New Jersey Department of Insurance (NJDOI). In that position, I was responsible for all property/liability filings, excluding workers' compensation, submitted to the NJDOI in addition to other responsibilities. From June 1986 until April 1988 I was Chief Actuary for the North Carolina Department of Insurance (NCDOI). I was responsible for all the actuarial work at the NCDOI, both property / liability and life / accident / health. From August 1977 to November 1984 I worked for the actuarial consulting firm of Woodward and Fondiller. My last position at that firm was Senior Actuary. Prior to that, from March 1976 to August 1977, I was employed by the National Council on Compensation Insurance (NCCI). While there, I worked on rate level analyses, benefit factor evaluations, and special projects. Before that, I attended college where I received a B.S. degree in physics from Cooper Union.
4. Q. Are you a member of any actuarial societies?
 - A. I am a Fellow of the Casualty Actuarial Society, an Associate in the Society of Actuaries, a Member of the American Academy of Actuaries, and a Fellow of the Conference of Actuaries in Public Practice. I have belonged to various regional actuarial organizations and professional actuarial committees. In addition, I served on the Property / Casualty and Life / Accident / Health Actuarial Task Forces of the National Association of Insurance Commissioners

(NAIC). I was also Chairperson of a sub-committee for the NAIC statistical task force. This sub-committee developed the current NAIC standard private passenger automobile statistical data reporting requirements.

5. Q. Would you please describe some of your additional professional activities?
 - A. I have written several papers dealing with various aspects of actuarial work. These have included topics on ratemaking, reserving, and reinsurance. I have also presented lectures and taught classes on these subjects. In addition, I was editor of Fresh Air Magazine, a newsletter published by Actuaries in Regulation. This is a special interest group of the Casualty Actuarial Society composed of actuaries who work for State Insurance Departments.
6. Q. Have you previously testified in regulatory proceedings regarding insurance rates
 - A. Yes. I have testified in property / liability insurance ratemaking proceedings in Arkansas, Maine, Massachusetts, North Carolina, Oklahoma, Rhode Island, South Carolina, Texas and Virginia. In addition, I have reviewed rate filings for the Insurance Departments in Delaware and New Jersey, which were resolved without a hearing.
7. Q. Do you have a resume setting forth your professional background?
 - A. Yes. It is included as an Appendix A to this testimony.

II - SUMMARY

8. Q. Have you reviewed the rate filing by Allstate Insurance Company (Allstate) dated October 15, 1990 requesting a +27.7% increase in private passenger automobile insurance rates, the additional information supplied in response to data requests, and other materials?

A. Yes. I have.

9. Q. What issues did you analyze in your study?

A. There were seven main items that impacted the overall premium level indication. These were the (1) loss development factors, (2) length of trend period / proposed effective date and annual trend factors, (3) impact of the FAIR Act, (4) consideration of the depopulation of the New Jersey Automobile Full Insurance Underwriting Association (NJAIFIUA or JUA), (5) underwriting profit and contingency factors, (6) additional contingency loadings and (7) Market Transition Facility (MTF) operating results. The seven items and the impact they have on the private passenger automobile rate level are set forth in Exhibit AIS-3, Sheet 1. The differences in the treatment of these items between myself and Allstate is given descriptively in Exhibit AIS-3, Sheets 2 & 3.

In addition, Allstate included consideration of the premium surtax and Automobile Insurance Guaranty Fund Loan Assessment in its filing. It is my understanding that these issues are the subject of a separate proceeding. I have therefore not included the impact of these items on either the income or costs for Allstate.

Furthermore, I have included a discussion of Allstate's prior profitability for New Jersey private passenger automobile insurance and the Casualty Actuarial Society's Statement of Rate-making Principles. While these items do not impact the rate level directly, they do address some of the issues included by Allstate in its filing.

10. Q. What was the result of your analysis?
- A. That the proposed rate increase by Allstate of +27.7% for private passenger automobile insurance will lead to excessive rates.

My indications are for an overall rate decrease of -11.4% for private passenger automobile insurance. This would be split as -11.4% for bodily injury (BI) liability, -22.2% for property damage (PD) liability, +8.5% for personal injury protection (PIP), +18.9% for uninsured motorists (UM), -19.9% for collision and -24.9% for comprehensive. These values are displayed in Exhibit AIS-1. The derivation of the rate level changes are set forth in Exhibit AIS-2, Sheets 1 to 6.

The seven items where I differ from Allstate are set forth in Exhibit AIS-3. The numeric values of these variables, as well as the impact on the rate level are set forth in Sheet 1. The differences are given in a descriptive manner in Sheets 2 & 3.

11. Q. Based upon your analysis, what is your recommendation regarding the needed private passenger automobile insurance rate level change for Allstate?
- A. I would recommend that the overall rate level be decreased by -11.4% compared to the rates currently in place. Within this overall value,

some coverages (i.e., PIP and UM) would have the rates increase, while for other coverages (i.e., BI and PD liability along with physical damage - collision and comprehensive) rates would decrease.

* * *

APPENDIX 3

DOUGLAS S. EAKELEY
Acting Attorney General of New Jersey
Attorney for Respondent
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

By: Donald M. Parisi
Deputy Attorney General
(609) 984-0183

SUPERIOR COURT OF
NEW JERSEY APPELLATE
DIVISION DOCKET NO. A-

IN THE MATTER OF	)	<u>Civil Action</u>
THE ASSIGNMENT OF	)	AFFIDAVIT OF
EXPOSURES TO THE	)	MARTIN ROSENBERG
AETNA CASUALTY AND)	
SURETY COMPANY)	

MARTIN ROSENBERG, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am currently employed as an Assistant Commissioner, Property/Casualty Division, of the New Jersey Department of Insurance. I was appointed to my present position in 1990.
2. Since 1988 I have been responsible for supervising the units that analyze and approve/disapprove property and casualty rate filings. This includes private passenger automobile insurance.
3. Further details on my educational and employment history are listed on pages 1 and 2 of Exhibit A.

4. I have personally undertaken the review of Allstate's rate filing dated October 15, 1990. I am the sole actuary within the Department responsible for this review.

5. Attached as Exhibit A is my prefilled testimony in the ongoing Allstate rate hearing which began on February 6, 1991 in the Office of Administrative Law.

6. Allstate requests an overall increase in private passenger automobile insurance rates of 27.74% in its October 15, 1990 filing.

7. I concluded from my review of Allstate's filing that the data provided by Allstate did not support the request for an overall rate increase of 27.74%. Rather, I concluded that the rate indication developed from the data should be an overall decrease of 8.3% (see Exhibit A).

8. As part of my analysis of the Allstate filing I reviewed the effect of the "depopulation requirement" on the indicated rate need of Allstate.

9. I have concluded that Allstate needs no rate increase to compensate for the depopulation requirement. I explain my analysis fully on pages 17-20 of Exhibit A.

10. Subsequent to the filing of my direct testimony, Exhibit A, Liberty Mutual Insurance Company filed the type of standard/non-standard rating plan described on pages 17-19 of my testimony. This filing was made on February 1, 1991 and approved by the Commissioner on February 11, 1991.

11. Allstate has yet to file a standard/non-standard rating plan.

/s/ M. Rosenberg
Martin Rosenberg

Sworn to and subscribed
before me this 22 day
of February, 1991.

/s/ Donald I. Bryan, Jr.
Donald I. Bryan, Jr.
An Attorney at Law of New Jersey.
